Supreme Court of New Mexico.

THOMASON *v.* TERRITORY.

Where, on a trial for a murder, of which the accused was the only witness, it appears, from his own evidence, that he sought out deceased while engaged at his work chopping wood, armed with a rifle and revolver, and shot him when he was in the act of fleeing, having dropped his axe, there being no evidence that there was any gun which he could get, the court will exclude evidence of threats by deceased, as in such a case they would be no justification.

Where, on a trial for murder, there is no evidence tending in the slightest manner to show a killing in self-defence, there is no error in a refusal to instruct the jury on the law of self-defence.

Where, on a trial for murder, there is no evidence to indicate murder in any degree less than the first, there is no error in refusing to instruct the jury on the other degrees of murder.

Where, in a trial under an indictment for murder before a jury, a portion of which cannot speak English, and a portion of which cannot understand Spanish, the jury, after having retired twice, requested the court to send the official interpreter to interpret between them, on the ground that they are unable to communicate with each other, and such interpreter is specially sworn, and sent into the jury room, over the exception and objection of the defendant, no presumption arises that such interpreter acted improperly and to the prejudice of the defendant, but it is for the defendant to show prejudice if any arose.

Where, on an indictment for murder, the prosecuting attorney has fully and fairly developed the facts by witnesses called by him before resting his case, there is no error in the court not requiring him to call all the witnesses to conversations with the defendant who were known and present.

APPEAL from the District Court, Socorro county.

William Bleeden, Attorney-General, for appellee.

Fiske & Warren, and *J. S. Tiffany*, for appellant.

The facts appear in the opinion of the court, which was delivered by

LONG, C. J.—The defendant in the court below, who is appellant here, was presented by indictment in the District Court of the Second Judicial District, sitting in the county of Socorro. The indictment charges the defendant with murder in the first degree. He pleaded not guilty, was placed upon his trial before a jury at the November term, 1885, and a verdict of guilty of murder in the first degree was returned, upon which judgment was regularly entered. From this judgment the defendant appeals. Four alleged errors are presented to this court by assignment and in argument as a reason why the cause should be reversed, and a new trial directed. They are stated in appellant's brief as follows: "First,

the court erred in excluding evidence of previous threats and assaults by deceased; second, the court erred in sending the interpreter into the jury room where the jury were considering their verdict, against defendant's objection; third, the court erred in not requiring the prosecution to call all the witnesses to conversations with defendant who were known and present; fourth, in refusing to give the instructions respectively asked by the defendant."

These alleged errors cannot be fairly determined without a consideration of the facts established by the evidence. On the 19th day of December 1885, the defendant shot and instantly killed the deceased in the county of Socorro. The killing occurred in the woods, when the parties were alone together, with no other witness of the transaction. The deceased being instantly killed, his version of the affair was not before the jury. In the morning the deceased went to the woods to chop poles, and was engaged in that work when, without any previous warning, the defendant appeared before him, while deceased was busy chopping. The defendant in his own evidence, taking up the occurrence at the point of meeting, says: "I went to Mr. Potter (the deceased), and asked him—he asked me, in fact—what I had come there for, and I told him I had come to have a talk with him, to see if we could not settle that difficulty without any more trouble or hard feelings; and he remarked, 'I will settle nothing; I expect to do just what I said I would do;' and started for a tree or bunch of trees that was about thirty or forty feet away. I told him when he first started to stop. He made no halt until he got in about eight or ten feet of this tree. I again told him to stop, and he turned, facing me or nearly so, and still leaning in the direction of me, and in the direction of the tree, as though he was still aiming to get to that tree, and get a gun, and I shot him, and he turned around, and made about two steps, and fell. After that I turned, and started back to the field to where I was at work. I was about thirty-five to forty feet from the tree near where he fell, at the time I shot." It also appeared from the evidence of J. R. Beavers that he was, on the morning of the killing, working in the field with the defendant, and that he (defendant) left the field, and was gone about one hour, when he again came back within that time to the field. The witness Nabor, on re-direct examination, testifies that defendant, after the killing, said to witness that the deceased set his axe down when the defendant came up to the place where deceased was chopping. George

Earle testifies that on the 19th he was working in a field for himself and the deceased; that he went to work about eight o'clock in the morning, and found defendant at work in the field hauling barley; that he saw the defendant leave the wagon with which he was at work and go away; that he watched him while he went about fifty yards, and witness then resumed work; that this was near a mile from where the deceased was killed. Soon after defendant left this field and went away, the witness heard a shot fired, and immediately heard some one cry out, three times, "Oh! oh! oh!" the first one loud, the next not so loud, and the last one faint. In about twenty-five minutes the defendant came back to the field from the direction where the shot was fired and the cries heard, and was armed with a rifle and pistol.

There is nothing whatever in the evidence to throw a shade of doubt on the facts thus proven, except as to the position of deceased when he was shot. There is evidence tending very greatly to prove that deceased was killed while chopping, and in the act of striking a blow on the limb of the tree with his axe. Giving the defendant all there is in his own evidence, it places him near the tree at the time of the killing. The facts, beyond doubt, are that defendant knew deceased was in the woods. He doubly armed himself, and went nearly a mile to seek him out. What the thoughts were that possessed his mind, and induced his action, can best be determined by what he did. He came upon the deceased wholly unarmed, who almost instantly started to flee, no doubt seeing the rifle in defendant's hand. As he fled, the defendant commanded him to halt, and upon the first moment, at the very instant the command was obeyed, and his body come to a rest, so that certain and deadly aim could be taken, the defendant fired upon deceased, and killed him in his tracks. Deceased had neither gun nor pistol, but was shot down in cold blood, while on the retreat. No weapons of any kind were behind the tree, or elsewhere within the reach of the deceased. Under such circumstances, evidence of previous threats by deceased would add nothing in favor of defendant, if introduced. He was not being assaulted or advanced upon or threatened or menaced. No weapon of any kind was within sight of the defendant or deceased, or present in fact, except the weapons of the defendant.

Speaking of prior threats, the learned author of Whart. on Hom., §§ 694, 695, says: "Certainly, if such evidence is offered to prove that defendant had a right to kill the deceased, there being no

proof of hostile demonstration by the deceased, then it is irrelevant. No man has a right to take another's life, if, by appealing to the law, he can avoid the encounter; for if A. threatens B.'s life, and the threat is known to B., his duty is to have A. arrested by due process of law, not to shoot him. On the other hand, if the question is as to which party is the assailant, then it is admissible to prove by prior declarations of either that the attack was one he intended to make. If defendant knew beforehand that his life was threatened, he should have applied to the law for redress."

This is certainly a salutary principle. It involves no personal humiliation, and is certainly no evidence of cowardice, for one who is threatened by another for his life, to appeal, in the first instance, to the law to interpose its preventive protection. Such a principle, well settled in law and adopted in practice, would tend to the protection of human life and preservation of order. The idea, if permitted to gain ground, that one who is threatened with great bodily harm must take his life in his hand, arm himself, and seek out his adversary, and either kill or be killed, will produce constant personal conflict, violence and disorder. Such a doctrine is as pernicious in morals as it is destructive of life and productive of evil results. It should, by statute, be made the duty of the prosecuting officers, upon receiving official information of such threats, to file, on their own motion, an information requiring the party making such threats to appear before some court having jurisdiction, and then to make inquiry, and, if the threats alleged are established, to require a substantial bond to maintain the peace. This should be an affirmative proceeding by the territory, on its own behalf, to protect life and preserve order. While these observations may not be necessary to the determination of the point involved, if they shall induce the legislative department to take action, some good may result therefrom.

Returning to the point involved. "For the purpose, therefore, in cases of doubt, of showing that deceased made the attack, and, if so, with what motive, his prior declarations are evidence:" Whart. Hom., § 695.

Evans v. *State*, 44 Miss. 762, also cited in Hor. & T. Cas. 328, is in point. The facts cited in that case were as follows: "The prisoner and deceased were plantation negroes. They had a difficulty. The deceased made threats of death against the prisoner. The prisoner, being armed with a gun, invited deceased, who was

at work in a field, to come to the cabins, and they would have it out. The deceased started for the cabins, and, while approaching, apparently with the intention of getting his gun, the accused shot and killed him." Evidence of the prior threats were offered, but excluded, and it was contended that this ruling was erroneous. The court there say: "If the excluded testimony had remained for the consideration of the jury, it would have had no influence on the verdict, unless there was testimony that the deceased at the time of the killing sought a deadly contest with the accused, or was making some demonstration towards the accomplishment of his threat. There were no developments which would have given this evidence a feather's weight."

The two cases are much alike. In the Mississippi case the deceased was shot as he approached, as it was claimed, seeking a gun, with which to kill defendant. Here the deceased was shot as he fled, as it was claimed, without an item of evidence, however, to support the contention, going to get a gun for the same purpose.

In *Myers* v. *State*, 33 Tex. 542, the court discuss a question like the one here. In that state it seems, from the opinion, "when a party is accused of homicide, he may justify the homicide by proof of threats against his own life by the slain party." In applying this statute the court say: "If the justification is attempted upon the grounds of such threats, * * * it must be unequivocably shown that the party slain was doing some act at the time of the killing which manifested an intention to carry the threat into execution. It is necessary that there should be at the moment some positive demonstration of the fell purpose."

In *Harris* v. *State*, 47 Miss. 325, it is held: "No mere threats by the deceased are admissible on a trial for murder in justification or palliation of the homicide, unless, in addition to such threats, there was also at the time of the killing some attempt or demonstration by the deceased showing a present purpose and imminent danger of carrying such threats into execution, or doing the defendant great bodily harm." To the same effect are *Hughey* v. *State*, 47 Ala. 97; *State* v. *Hall*, 9 Nev. 58.

It is not doubted, where there is any evidence which tends to show, even in the slightest degree, that the deceased at the time of the killing was advancing in a threatening manner on the defendant, or occupied a menacing attitude towards him, or made the slightest move towards attack, or did any act indicating a present

intent to do defendant great bodily harm, that in such cases evidence of prior threats by deceased against the prisoner, and communicated to him, would be competent evidence to be weighed by the jury. The courts should be careful about excluding evidence of this character, and may do so only when there is an entire absence of such circumstances. If there is even slight evidence to indicate that the act of killing was done under a present, reasonable apprehension to himself of great bodily harm, prior threats should not be excluded. In this case, the defendant did offer to prove prior threats, but did not offer to further prove that deceased made hostile demonstrations even of the slightest kind towards defendant, at the time of the killing, nor did he show a gun was behind the tree, or a weapon of any kind, or that the defendant so believed. Under these circumstances, the defendant having sought out the deceased, the court below was right in excluding the evidence. If it were true that deceased had made threats against the defendant, the latter should not have doubly armed himself, and followed up the deceased in a manner likely to cause conflict.

The observations of the learned court in *Harris* v. *State*, *supra*, are very pertinent to the present: "While courts must adhere to reason and justice, as developed by time, experience and enlightened adjudication, they must, nevertheless, enforce the laws with all the rigor of which they are capable, as a duty alike to the law-abiding and criminal; for should it become the recognised right of a man to pursue and shoot down another for a threat to take life simply, without any overt act indicating an intention to carry the threat into execution, crime and violence would run riot. * * * To allow prior threats to be given in evidence, under such circumstances, upon the mere proof of a naked and wanton killing, as in the case at bar, would be to invite a multiplication of tragedies."

We find no error in the ruling below excluding this evidence.

There was no evidence whatever before the jury tending, in the slightest manner, to show a killing in self-defence; so there was no error in the refusal to instruct respecting the law of self-defence.

There was no evidence to indicate murder in any degree less than the first. It was a clear, undoubted case, on the evidence really before the jury, and including that offered and excluded, of murder in the first degree, and nothing whatever to indicate anything less; so there was no error in refusing to instruct as to the other degrees.

The next contention made by defendant presents a question of greater difficulty. It is one, so far as can be found in our research, never decided. Questions somewhat analogous have, however, been determined, and the ruling here must be settled by the presumption which is to prevail respecting the action of the interpreter.

Did the court err in sending an interpreter to the jury?

The principle contended for by defendant is discussed in the cases cited below. It is there, in effect, held that, when the defendant relies upon an alleged irregularity of the court or jury, the burden is upon him not only to show it, but also to show he was prejudiced thereby: *Reins* v. *People*, 30 Ill. 273; *Adams* v. *People*, 47 Id. 376; *State* v. *Wart*, 51 Iowa 587, 2 N. W. Rep. 405; *People* v. *Douglass*, 4 Cow. 26; *Stephens* v. *People*, 19 N. Y. 549. Authority, however, may be found to the contrary.

The general rule is stated in Thompson and Merriam on Juries, § 349, in this manner: "The courts generally agree that, where the interference of strangers with the jury has not been promoted by the prevailing party, has not been attended with corruption, and it does not reasonably appear that substantial prejudice has resulted to the party complaining, the verdict will not be disturbed for this reason, whether the cause be civil or criminal, capital or otherwise. * * * The fact of communication, without more, creates in the view of some courts an unfavorable presumption, which, unexplained, will overturn the verdict; whereas, in the view of other courts, the mere fact of such a communication will not be ground for setting aside the verdict, unless it be made to appear probable that prejudice resulted from it."

It is thus seen there is no well-settled, definite rule on the point raised by appellant as to the presumption arising from such an irregularity, if it be one, as that complained of. A great weight of authority can be cited, holding that the presumption is against the verdict from an unauthorized communication to the jury after retirement, while equally strong and respectable authority is to the contrary. This condition of the authorities should forcibly suggest, at least in capital cases, where any act has in fact operated to the prejudice of the defendant, that it be shown, and should induce the officers prosecuting for the state, where it is even alleged that a prejudicial irregularity has been committed, to show to the court below, and incorporate in the record, the facts which prove that no

harm resulted to the prisoner, rather than to leave so important a matter to turn upon a technical legal presumption, not well settled. It will not be necessary to enter upon an analysis of those cases which hold that, when an irregularity is shown with respect to the jury, during deliberation, it is presumed to be hurtful to the prisoner, or of those which hold to the contrary, for this case may fairly be determined upon its own facts, as they differ in essential particulars from most of those decided. Jurors in this territory, in the District Court, are upon the panel at every term who do not understand or speak the English language, and by their side are those who do not understand or speak the Spanish. Fully three-fourths of those qualified for jury duty are Mexicans, with either a limited knowledge of the English, or wholly ignorant of it. Under such circumstances, the statute provides for an interpreter, who acts under oath, and who is an officer of the court, and through him the business is conducted in both languages. While it is not, in terms, provided that such an interpreter may attend the jury in its deliberations, yet the necessity therefor is frequently imperative. The record in this cause discloses such a necessity. It recites the facts as follows: "It was afterwards shown to the court that there were both Spanish and English-speaking persons on the jury, and that they were unable to communicate with each other, and that the jury requested the court to furnish them with an interpreter. The defendant objecting to this, the request was at first denied, but afterwards, the request being renewed, with the statement that an interpreter was absolutely necessary, the official court interpreter was specially sworn, and sent into the jury room, over the exception and objection of the defendant."

This case must stand on its peculiar facts. A jury was in deliberation without the power of communication with each other. All possibility of deliberation or agreement was thus cut off. The jury twice earnestly asked to be supplied with a medium of communication. An officer of the court, specially provided by statute to interpret evidence, was first sworn, and then sent to the jury room. The presumption is, in the absence of the oath, that it was not to communicate *to* the jury, but only to act as the *medium* of communication, and take no part in the deliberation. He could not have been an embarrassment to the jury, for that body twice earnestly asked for his presence. The interpreter did not intrude himself upon the jury as a mere listener, but went by direction of

the court, on the request of the whole panel. This case is not like one where, unbidden, a stranger goes into the jury room as a spy upon the deliberations, or as an unwelcome intruder. Such a person might be a restraint upon that free interchange of opinion so important to correct results. It is not in this case shown, or attempted to be proven, that the interpreter said a word, or performed an act, inimical or prejudicial to the prisoner, or that any juror was restrained in the exercise of his duty, or in the slightest influenced by the presence of the interpreter. Acting under oath and the order of the court, the presumption should be in favor of proper action by him, rather than against it. Under the circumstances, we are not willing to hold the presumption is that he acted improperly and to the prejudice of the defendant. If this officer of the court did or said anything prejudicial, that is a fact for the defendant to show in the court below in the first instance.

The ruling in this case on the point under consideration is predicated entirely on the facts of the case, the composition of the jury, its inability to communicate within its own body in the absence of an interpreter, its repeated request, the official position of the person sent in, and his oath. Under such a state of facts, there is no presumption that he did or sought to influence the verdict, or did anything wrong or prejudicial to defendant. We do not express any opinion as to the presumption in other irregularities, arising from the action of one not sworn, or directed specially by the court. Juries, in capital cases especially, should be carefully guarded; but we cannot hold a rule so strict and technical as to often work a mistrial when juries are so constituted that they cannot communicate. Nothing but the most urgent necessity should excuse the court in sending, even under the situation in this territory, an interpreter to the jury; but such an urgent case existed in the court below.

As to the last point, we do not believe it was the legal duty of the prosecuting attorney to call the remaining witnesses. He had fully and fairly developed the facts before resting the case, and he was required to go no further. We find no error in the record. The judgment of the court below is affirmed.

HENDERSON, J., concurred.

A motion for a rehearing having been made, the following opinion was delivered:

PER CURIAM.—The defendant in this cause files a motion for rehearing, and urges a further alleged error on the trial below. The new contention is that the court, at a time when the jury was deliberating, made to and received communications from them in the absence of the defendant; also that the proceedings respecting the appointment of an interpreter to the jury were held in the absence of the defendant from the court-room.

The first question to determine on this contention is whether the facts shown in the record sustain the position argued. If, in fact, the defendant was in the court-room when such proceedings were taken, and such communication was not so held in his absence, then defendant's motion must be denied. It is necessary, therefore, to consider the record, which is as follows:

"*Territory* v. *Jasper Thomason.* (Murder. No. 757.)

"At the same regular term of said District Court, on the 8th day of December A. D. 1885, the same being the 18th day of said term, the following among other proceedings were had and entered of record: The trial of this cause proceeds, and again come the parties, the defendant being present by counsel as well as in his own proper person, the arguments of counsel are heard, and, on receiving the instructions of the court, the jury retire to consider of their verdict, in the custody of a sworn bailiff; and the jury request that they may be furnished with an interpreter, and the court, upon investigation, finding it necessary that an interpreter be furnished in order that the jury may communicate with each other, appoints E. V. Chaves as such interpreter, who is specially sworn to interpret between the members of the jury in this cause, and to keep secret their communications and investigations. Now again come the parties, the defendant being present by counsel as well as in his own proper person, and comes also the jury;" (and the record recites the return, at that point in the trial, of the verdict).

This is the record as shown on four of the transcripts. The same proceedings are also shown in the bill of exceptions at p. 38, as follows: "And thereupon the jury retired to consider their verdict. It was afterwards shown to the court that there were both Spanish and English-speaking persons on the jury, and that they were unable to communicate with each other, and the jury requested the court to furnish them with an interpreter. The defendant objecting to this being done, the request was at first denied, but afterwards, the request being renewed, with the statement that an

interpreter was absolutely necessary, the official interpreter was sworn, etc."

It is evident that these recitals both refer to the same transaction, and should be construed together, as they contain all the proceedings upon the contention involved. Counsel for defendant places special emphasis on the use of the word "afterwards." That word is used simply to denote that the request for an interpreter was later in time than the retirement; but does it therefore follow that the request came from the jury while deliberating in their room separate and apart from the court, rather than in open court, in presence of the defendant? As a matter of fact, the room in which jurors deliberate is often adjoining and immediately opening into the court-room, and it frequently occurs, especially when the evidence is manifestly clear and convincing, and so the return of the jury is apparently a matter of very short time, that the prisoner remains in the court-room under the custody of the sheriff, and it may well be concluded that such was the case in this instance. The record really affirmatively discloses that the defendant was in court in person until after all the proceedings respecting the interpreter were taken. The instruction of the jury, the request for an interpreter, the fact of his being sworn, are, by a fair reading of the record, shown, as we think, to be one continuous act in presence of the defendant, in open court. The record affirmatively shows the presence of the defendant when the instructions were given. There can be no presumption that he then retired; and that he did not, in fact, do so, but remained in person in court during all the proceedings respecting an interpreter, is apparent from the recitals in the record, especially in view of the statement therein "that the defendant objected to this being done." The motion for a new trial presented for the consideration of the court below has been carefully examined. It nowhere states that the court communicated with the jury, either by message or otherwise, at a time when the jury was deliberating, separate and apart from the court. Neither does it state the interpreter was appointed and sworn by the court, and sent to the jury, either in the absence of the jury from the court-room, or in the absence of the defendant. If, in fact, the court had received a message from the jury while they were deliberating in some other place, asking for an interpreter, and the court had, in the absence of the defendant, considered such message, and determined to grant their request, and

had then, in defendant's absence, selected such interpreter, and caused him to be sworn and sent to the jury, such a proceeding would, beyond all doubt, have so deeply impressed the learned counsel who so ably represents the defendant, that it would have been made a ground in the motion for a new trial in the court below. The absence of such a cause in the motion confirms the view we have taken respecting the construction of the record on the point involved in this motion.

Upon a careful reconsideration, the motion for rehearing must be denied, and it is so ordered.

In the early stages of trial by jury, the twelve men were chosen because they were witnesses of the transaction and had personal knowledge of the facts involved in the controversy between the plaintiff and defendant. Then for an intermediate period, both the personal knowledge of the jury and the evidence produced by the parties were relied upon as the basis of their finding. And as the changing circumstances of society made it impossible to obtain twelve men who had personal knowledge of the facts in dispute, the jury finally emerged into the present form, where it is their duty to weigh the testimony and find their verdict from the evidence. As early as the time of Henry IV., it seems to have been the custom to supplement at least, the imperfect knowledge of the jury by evidence, and in a case reported in the year book of the second year of that reign, it is said, "after the jury are sworn they should not take with them any other evidence than that presented to them in court." In the time of Henry VI., the jury still appear to be chosen because they were witnesses; and in the time of Charles II., in 7 State Tr. 267, personal knowledge of a juror was no ground of objection to him. From a description of a trial given by Fortescue in his De Laudibus Legum Angliæ, in the time of Henry VI., it appears that the province and duty of the jury was about the same as at the present time. He says, "after the opening, each party has liberty to produce before the court all such witnesses as they may please or can get to appear on their behalf, who being charged upon their oaths, shall give in evidence all that they know concerning which the parties are at issue; and, if necessary the witnesses may be heard and examined apart. The whole evidence being gone through, the jurors shall confer together at their pleasure as they shall think most convenient upon the truth of the issue before them, with as much deliberation and leisure as they can well desire."

As it became necessary to supplement, or supply, the jurors' personal knowledge of the facts by the testimony of witnesses, it became important to confine the jury to the testimony given under the sanction of the court as the ground of their finding, and therefore they were sworn to give their verdict according to the evidence. Obedience to this rule implies that the jury shall consider such evidence only as the court admits, and forbids the reception of evidence from any source outside of court; any interference with the free deliberation of the jury by the judge, parties or third persons; any misconduct on the part of the jury, which would show that they had not considered the evidence, or had acted through prejudice.

In Trials Per Pais, ch. 12, it is said to be "a maxim and old custom in the law that the jury shall not eat or drink after

they be sworn, until they have given in their verdict, without the assent of the justices; and if they eat at the costs of the parties, the judgment will be arrested." * * * "If they, after the evidence is given to them do, at their own charge, eat or drink, either before or after they agree upon a verdict, it is fineable; but, if before they agree, they eat or drink at the charge of a party, and the verdict be given for him, it shall be void, but not, if it be given for the other party. But, if after they agree, they eat or drink at the charge of him for whom they give their verdict, it is not void."

In a case in 1 Dyer, 6 H. VIII., it was alleged in arrest of judgment that the jury had eaten and drank. It was proved that when the jury had agreed and were returning to give their verdict they saw Chief Justice REDE going to an affray, and they followed him, "et in veniendo viderunt scyphum unde biberunt." The jury was fined, but the plaintiff held his verdict. In 2 Dyer 218, after the jury had been charged, they returned and said that they were all agreed except one, who had eaten a pear and had a drink of ale, which enabled him to hold out. At the plaintiff's request they were sent back, and afterwards found a verdict for him. The verdict stood, but the juror was committed. In Leon. 1 Part 133, a jury remained out so long that a search was made by the court officers, who discovered that two of the jurors had eaten figs before they agreed, and three had pippens in their pockets but did not eat them. The jurors who had the refreshments were fined, but the verdict was not disturbed. In a case in Godbolt, three of the jurors had sweetmeats in their pockets and were for the plaintiff, but upon being searched they promptly agreed with the other nine and found for the defendant. The court decided that whether they had eaten the sweetmeats or not, they were fineable, as it was a very great misdemeanor for them to have them. In the case of *Duke of Richmond* v. *Wise*, Trials Per Pais, *supra*, the court say: "If the jury receive a treat from the plaintiff, after they have agreed but before they deliver their verdict, the verdict is good; but if they change their verdict by reason of a treat from either side it is not good. Otherwise most verdicts given at the assize would be void, for it is the usual thing for the jury to receive a collation, after the privy verdict, from the party for whom it is given." In *Hughes* v. *Budd*, 4 Jur. 150, it was held that the presence of the jury at intervals during the trial in the same room with the plaintiff's attorney, smoking and drinking, was sufficient ground for a new trial. In *Everett* v. *Youells*, 4 Bl. Ad. 681, it was decided that a verdict would not be set aside, merely because food was delivered to a juryman after the jury retired, unless it was furnished by a party, or enabled the juryman to hold out. In *Cooksey* v. *Haynes*, 27 L. J. (Ex). 371, a new trial was granted on the ground of misconduct where the jury covertly procured food. In the case of *Morris* v. *Vivian*, 11 L. J. (Ex.) 367, two of the jurors had been entertained by the defendant, during the trial. It was admitted that this was customary in that part of the country where public accommodations were inadequate, and the plaintiff who moved for a new trial upon the ground that the rule of law had been violated, admitted that he did not believe that the jury had been influenced nor that there was any ground of suspicion of unfair conduct. The court refused a new trial, and state the law to be that "where all that remains for the jury is to deliberate and give their verdict, if they eat or drink at their own expense, they may be fined; if at the expense of the party for whom they give the verdict it is void. The cases seem to apply to the whole jury, and only to acts done by them after they are charged. This case does not fall within the rule."

A verdict is avoided when the jury,

after retiring, receive any evidence from a party for whom they decide, but not if they decide for the opposite party. (Trials Per Pais, *supra*.) If they carry out with them any unsealed evidence, which had been given at the trial, it is an irregularity, but the verdict is good: 1 Inst. 227 *b*. In *Metcalfe* v. *Deane*, 1 Cro. Eliz. 189, a verdict was set aside where the jury, after retiring, examined a witness who had testified in the case. In a case cited in Trials Per Pais, *supra*, a verdict was set aside where one of the parties said to the jury, after they retired, "you are weak men; it is as clear of my side as the nose on a man's face;" as this affirmation was new evidence which might much persuade the jury. And in a case in Keb. 300, 1st Part, it is held that a verdict is avoided if the servant of one of the parties speak to the jury and the verdict is for his master; but not, if it is for the other party. In a case in 11 H. IV., 17, a judgment on a verdict for plaintiff was stayed, where he had given to a juryman before he was sworn an escrow, which he afterwards showed to his fellow jurymen, although it gave the same testimony as the plaintiff when he testified in the case. In *Spencely* v. *De Willott*, 3 Smith 321, a new trial was refused where the principal witness had distributed a printed statement containing the evidence he afterwards gave, as it did not appear to have been seen by the jury. In *Coster* v. *Merest*, 3 B. & B. 272, a new trial was granted where handbills, containing reflections on plainliff's character, had been distributed in court and shown to the jury, although the defendant denied all knowledge of them. In *King* v. *Burdett*, 2 Salk. 645, a new trial was refused where the jury obtained an act of common council which had been in evidence. The court say, "this was an act of neither side, but was evidence for both." It was, however, admitted to be an irregularity.

In *Gainsford* v. *Blachford*, 6 Price (Ex.) 36, a new trial was granted where the judge, who was summing up in favor of one party, was stopped by the jury who said they were satisfied, and immediately gave a verdict for the opposite party. And in *Dent* v. *The Hundred of Hertford*, 2 Salk. 645 a verdict was set aside where the foreman declared that the plaintiff should never have a verdict whatever witnesses he produced. In *Allum* v. *Boultbee*, 18 Jur. 406, a new trial was granted because a juryman had expressed himself against the defendant before he heard his case.

The same rule has been followed in this country, although there have been variations in its application in different localities and by different courts. It has been held generally that the judge or justice can instruct the jury only in open court and in presence of the parties. In *Sargent* v. *Roberts*, 1 Pick. 337, the jury after retiring and being out for some time, sent a written communication to the judge, stating that they could not agree. To this the judge replied in writing, giving them certain instructions, and under these they found a verdict. It was admitted that it had been for years the practice in Massachusetts for such communications to pass between the judge and jury. But the supreme court decided that such practice was improper, and, although the instructions so given were correct, a new trial must be granted because they were given in private. The same application of the rule was followed in *Fish* v. *Smith*, 12 Ind. 563; *Hoberg* v. *State*, 3 Min. 262. In *Crabtree* v. *Hagenbaugh*, 23 Ill. 349, a verdict was set aside merely because the judge went into the jury room during the deliberations of the jury, although when there he merely declined to explain certain written instructions. The court say, "we choose to assume that what was said and done by the judge while in the jury room did not influence the jury, for we think the judgment should be reversed for the simple reason that such an inter-

view did take place. If this verdict is allowed to stand because, in this case, no harm was done, we open the door in all such cases to the inquiry as to whether the party has been injured." In *Watertown Bank and Loan Co.* v. *Mix*, 51 N. Y. 558, the jury, after retiring sent a written communication to the judge, asking whether a witness had proved a certain fact. The judge handed this to the stenographer, who, after looking at his notes, wrote on the paper, "No such question was asked," and the judge then returned the paper to the jury. All this was done without the knowledge of the plaintiff, who lost the verdict. A new trial was granted and it was held by the court, that it was not incumbent on the party who moved for a new trial, on the ground of a communication between the judge and jury, to show affirmatively that such had tended to his injury. But in *Goldsmith* v. *Solomons*, 2 Strobh. 296, a different view of the right of the judge was taken and the law of *Sargent* v. *Roberts* was criticized adversely. The foreman returned after the jury had retired and asked the judge how their verdict should be if they found against the will. To this he replied without communicating with counsel. The supreme court held that no error had been committed. "All such matters," they say, "must be left to the discretion of the judge. To hold that after the jury is sent out and the constable sworn to take charge of them, and the court is adjourned over to the next day, the judge should have no communication with the jury, is pushing judicial coyness to the very verge of mere prudery." Where such communication is made with the consent of the parties, it has been held that there is no reason for a new trial: *Bunn* v. *Croul*, 10 Johns. 239. But in *Taylor* v. *Betsford*, 13 Ibid. 487, it was held that such consent must affirmatively appear, and could not be inferred from the fact that the parties knew what the justice had done. Such assent may be inferred from circumstances, as where in *Hancook* v. *Salmon*, 8 Barb. 564, the justice went into the jury room at the request of the jury and with the knowledge and consent of the parties, a consent that he might read the testimony to the jury was implied. Merely answering "no," by the justice to a question from a jury is not ground for a new trial. *Thayer* v. *Van Vleet*, 5 Johns. 111.

The reception of evidence by the jury, after they retire to consider of their verdict, is still forbidden. Some courts have enforced the rule in this respect very strictly; while others have relaxed a little, and seem to hold that the verdict ought not to be interfered with, unless such evidence was supplied by a party or with his consent, or had been obtained irregularly by the jury or exercised an improper influence upon them. New trials were granted in the following cases, where the jury during their deliberations had the minutes of testimony taken by plaintiffs' attorney, although it was not shown how they obtained them: *Durfee* v. *Eveland*, 8 Barb. 46; where they obtained and read without consent of court or parties a newspaper which contained, correctly reported, a portion of the charge delivered to them: *Farrer* v. *State*, 2 Ohio St. 54; where they sent for and examined a witness who had testified in the case: *Thompson* v. *Mallet* 2 Bay 94; where they consulted books and papers referred to by the witnesses: *Loth* v. *Macon*, 2 Strobh. 178; where a juror in an action for a breach of contract for sale of stock, obtained from a broker the price of certificates at a certain time, and communicated this to the others: *Brunson* v. *Graham*, 2 Yeates 166; where they received from the plaintiff a statement of certain expenditures which were involved in the suit: Ibid. 273; where a paper containing the plaintiff's claim for damages was accidentally passed with other papers to the jury: *Benson* v. *Fish*, 6 Greenl. 141;

where a deposition not read in evidence was taken out and read by the jury, the court holding that the jury could not tell how far their minds might have been influenced by it: *Stewart* v. *Burlington, &c., Rd.*, 11 Iowa 62; to about the same effect are *Coffin* v. *Gephart*, 18 Ibid. 256; *Bronson* v. *Metcalfe*, 1 Disney (Ohio) 21; *Watson* v. *Walker*, 23 N. H. 471; also where a juryman, after retiring, communicated to his fellows a statement of facts which he knew of his own knowledge, but had not disclosed in court: *Sam* v. *State*, 1 Swans. 61; where a paper which might have influenced the jury came before them by accident and was read. The court intimated that if the paper had not been read a new trial would not have been necessary: *Killen* v. *Sistrunk*, 7 Ga. 283. But a new trial has been refused where the jury called in the county clerk to make a calculation for them after they had reached a conclusion: *Dennison* v. *Powers*, 35 Vt. 39; where a paper not in evidence went out with the jury, the court held that it must appear that the paper gave information which by a reasonable intendment might have had some influence upon the jury in making up their verdict: *Town of Peacham* v. *Carter*, 21 Vt. 515; where the notes of counsel were taken out by the jury, it was held, that a new trial would not be granted unless they had been surreptitiously introduced by counsel, or had had some influence upon the jury; and the testimony of the jury was heard to prove how the notes had been obtained and what influence they had: *Ball* v. *Carley*, 3 Ind. 577. The same view was taken in a criminal case: *Bersch* v. *State*, 13 Ibid. 434; and in *Hix* v. *Drury*, 5 Pick. 296. And it was held not to be improper for the jury to refresh their recollection by reading the notes of interrogatories which had been read upon the trial: *Andrews* v. *Tinsley*, 19 Ga. 303.

The jury are expected to look to the court for their information upon the law of the case. In *The State* v. *Smith*, 6 R. J. 33, a verdict was set aside because the jury, during their deliberations, consulted the Revised Statutes, and so, in *Newkirk* v. *State*, 27 Ind. 1, where they consulted Bishop's Criminal Law. But that the jury helped themselves to the law, was not considered a sufficient ground for setting aside their verdict in *Commonwealth* v. *Jenkins*, Thatcher's Criminal Cases 118.

There is considerable difference of opinion as to what is an improper interference with the jury on the part of the officer in charge of them. A new trial has been granted for this reason, where the sheriff, without any authority, told the jury that unless they agreed speedily the judge would take them with him to another county: *Gholston* v. *Gholston*, 31 Ga. 625; where the officer in charge said within the hearing of the jury, "this is a worse case than D.'s." * * * "Public opinion is against the accused." The court say, "the officer is required by his oath as well as by the nature of his duty not to speak to the jury during their deliberations:" *Nelms* v. *The State*, 13 S. & M. (Miss.) 501. In *Slaughter* v. *The State*, 24 Tex. 410, a verdict was set aside because the officer stayed in the jury room. And it has been held that in no case should the officer in charge be present during the deliberations of the jury, nor speak to them, except to ask whether they had agreed: *Rickard* v. *State*, 74 Ind. 275; *McClary* v. *The State*, 75 Id. 261; *Stull* v. *Snyder*, 20 Kern. 306. In *The People* v. *Knapp*, 42 Mich. 267, a new trial was moved for on the ground of the officer's presence. The court below refused it. But the Supreme Court reversed the judgment and held, in an opinion by COOLEY, J., that such presence must to some extent operate as a restraint. A new trial was granted where the officer told the jury that the court had adjourned and left orders to lock them up all night, unless they agreed; that the case was clear for

the plaintiff, and they had better agree and go home: *Thomas* v. *Chapman*, 45 Barb. 98.

Where, however, it affirmatively appeared that the jury had paid no attention to an attempted interference by the officer, a new trial was refused: *Baker* v. *Simmons*, 29 Barb. 198; and a new trial has been refused where the officer in answer to a juror's question how long they would be kept together, replied, he did not know: *Leach* v. *Wilbur*, 9 Allen 212; also where the officer told the jury they should have no food until they agreed. It was held that this being an illegal communication, it could not have operated prejudicially to the accused: *Pope and Jacobs* v. *The State*, 36 Miss. 121. In *Taylor* v. *Everett*, 2 How. Pr. 23, the constable in charge communicated in writing to the foreman that a boy had been ground up in his mill, and emphasized this statement by drawing his hands across his legs. The foreman swore that from his desire to get home after receiving this intelligence, he agreed to a verdict he would not otherwise have agreed to, and two jurors said, that out of sympathy for the foreman, they also had agreed. Seven of the jurymen swore that the information had not influenced them in arriving at a verdict. A new trial was refused, the court holding that they could not receive the affidavits of jurors as to what had influenced their verdict.

A new trial has been granted where the circumstances have been such that, through the fault of the officers, an improper influence might have been exerted on the jury, without proof that it actually has been. In *Hare* v. *State*, 4 How. (Miss.) 187, after the jury retired, they were left in charge of one who was not a sworn officer, in the absence of the bailiff. SHARKEY, C. J., said, "If the purity of the verdict might have been affected, it must be set aside. No doubt must rest upon it." In *Boles* v. *The State*, 13 S. & M. (Miss.) 398, after the jury retired, they were taken, with the prisoner's consent, to a hotel to dine, an officer sitting between them and the guests. After dinner, a barber was admitted to their room, who shaved some of them, and remained a few minutes during the bailiff's absence. There was no evidence of any tampering with the jury. A new trial was granted. The court say in their opinion, "It would be an unsafe rule to hold that the verdict must stand unless tampering was proved. The prisoner would not be able once in a hundred times to show this. No one must be allowed to speak to the jury. Were this rule departed from, the verdict would rest upon the discretion of the court." In *McCann* v. *The State*, 9 S. & M. (Miss.) 465, it was held that where the whole jury, or a part, were exposed to undue influence by being in charge of an unsworn officer or by having opportunity through separation of conversing with third persons, the verdict would be set aside, unless it affirmatively appeared that no undue influence had in fact been exerted upon the jury. As early as *Commonwealth* v. *McCaul*, 1 Va. Cases 271, it was held sufficient ground for a new trial, that the jury might have been subjected to improper influence through an unjustifiable separation. In *Commonwealth* v. *Roby*, 12 Pick. 496, after the jury had retired, one of the constables in charge and a stranger carried reasonable refreshments into their room, but no conversation respecting the case took place. A new trial was granted, SHAW, C. J., stating the law to be, "The result of the authorities is, that where there is one irregularity, that may affect the impartiality of the proceeding, as where refreshments have been furnished by a party, or the jury have been exposed to such influence, as where they were improperly separated, or have received unauthorized communications, there, inasmuch as there can be no certainty that the verdict has not been improperly influenced, a new trial must

be granted; but where the irregularity consists in that which does not and cannot affect their impartialtty and disqualify them from exercising their judgment, the verdict will stand.

Mere exposure to influence either from the parties or third persons, is not generally sufficient ground for a new trial, unless it appears that such influence actually was, or might have been, beyond a reasonable doubt, exerted.

A verdict was set aside where the counsel for the party who afterwards obtained the verdict entertained two of the jurors during the trial: *Walker* v. *Hunter*, 17 Ga. 364. In *Luster* v. *The State*, 11 Humph. 169, it was held that the mere presence of a stranger in the room during the jury's deliberations, where there was no conversation and no motive for the intrusion, and no attempt to confer with the jury, was insufficient ground for a new trial. In *Ned and Taylor* v. *State*, 33 Miss. 364, after the jury retired, one of them called through the window to his wife to bring his supper. The person who brought it remained in the jury room, but had no communication with the jury. A new trial was refused, the court saying "a verdict rendered under circumstances that might affect its purity, will be set aside; but otherwise, it will not be." In *People* v. *Boggs*, 20 Cal. 432, it was held that where the interference of strangers with the jury was unattended with corruption and has not been prompted by a party, and it does not appear that injustice has been done, the verdict will not be disturbed in either criminal or civil cases. In *Collier* v. *State*, 20 Ark. 36, it was said that although the jury be guilty of misconduct, by conversations and interviews with others during the progress of the trial, a new trial will not be granted if it appear that there was no abuse, and no injury resulted to the defendant. In this case several witnesses swore, upon a motion for a new trial, that the prosecuting attorney and his assistant had been seen singing with the jury after the daily adjournment of the court, during the progress of the trial. It appeared that these musical attorneys occupied a room adjoining that used by the jury, both of which opened on a porch of the hotel, where the singing had taken place. The attorney swore that he only assisted the jury, who were unable to carry the time, by giving them the "proper air." The court, mindful of the old adage, "music hath charms," evidently felt that the dulcet notes of the attorney could have only a mollifying and humanizing effect on the jury, and therefore would operate in favor of the prisoner; and, if after all this, he was convicted, the verdict ought to stand. In *Martin* v. *Mitchell*, 28 Ga. 382, one of the jurors slept one night in the same room with the attorney of the party who afterwards obtained a verdict. The room was in a tavern, and the accommodations not being of the best, the sheriff slept in the same bed with the juror. The juror paid his own expenses, and there was no conversation about the case. A new trial was refused, upon the ground that there was nothing to excite suspicion. The court, in their opinion, remark: "Such conjunctions are to be regretted and ought to be carefully scrutinized;" but the learned court does not explain whether the "conjunction" was sleeping in the same room with the attorney or in the same bed with the sheriff.

Ordinary salutations or remarks about indifferent matters, between parties and the jury, are not sufficient grounds for a new trial; but communications which the jury use as a basis for their verdict are prohibited. In *Blalock* v. *Phillips*, 38 Ga. 216, a new trial was granted because one of the jurors, during the trial, conversed with one not on the jury, in the presence of others, about the case. Also, where the jury, during their deliberations, conversed with a witness (*State* v. *Brazil*, Ga. Dec., 2 Part. 107), where the foreman, after the jury retired, stated

to them that the plaintiff in a conversation had satisfied him with regard to a difficulty: *Ritchie* v. *Holbrooke*, 7 S. & R. (Pa.) 458; and in *Knight* v. *Inhabitants of Freeport*, 13 Mass. 218, a new trial was granted where the son-in-law of the plaintiff said to a juror, that the case was of great consequence to him, as he might have to pay the costs, and the defence was spiteful. But in *White* v. *Wood*, 8 Cush. 413, a new trial was refused where one of the parties told a juror, during an adjournment, that he had been home to get two deeds; which were afterwards offered in evidence. A new trial will not be granted on account of casual remarks made to the jury after they are sworn: *Burtine* v. *State*, 18 Ga. 534; *Epps* v. *State*, 19 Id. 102; *Cohron* v. *State*, 20 Id. 752.

Misconduct of the jury which has not been injurious to defendant, will not be ground for a new trial: *People* v. *Hartung*, 8 Abb. Pr. 132.

Was the presence of the interpreter with the jury an improper interference? Certainly nothing is such interference which is essential to the proper discharge of the jury's sworn duty, to find a verdict according to the evidence. The last, and by no means the least important step in the discharge of such duty is the full and free deliberation of the jury upon the evidence; and as their deliberation is to be that, not of each man by himself, but of the twelve together, so that unanimity may be reached, the interchange of ideas is absolutely essential.

The interpreter is an officer of the court, sworn to discharge a particular duty; and there is therefore the presumption that he will do his duty only. In all the cases where the verdict has been set aside because of the irregularity of an officer's conduct, he has either transgressed the line of his duty or done something which was unnecessary to its proper discharge.

The judge discharges his duty when he instructs the jury upon the law, in open court; the bailiff is performing his when he sees that the jury is excluded from communication with the outside world; and therefore the presence of either in the jury room is an irregularity, because unnecessary; and the law, in its desire to have justice impartially administered, and to avoid even the presumption of any unfairness, condemns the act. But the interpreter's presence would seem to be essential to the complete performance of the jury's obligation. In no case has an officer, who has simply performed his duty, been condemned because he might have done otherwise. Proof that he did what he was not required to do, although no evil consequences have been shown to follow, has been sufficient, in some cases, to set aside the verdict. If the interpreter had acted improperly, it could have been proved by the affidavits of the jurors; for while they will not be received to show what the jury did or said or thought, they will be to show improper conduct on the part of the officer. Every reasonable doubt should be resolved in favor of the prisoner; but it is certainly not incumbent on the court to turn trial by jury into a farce, by committing the question of the defendant's guilt or innocence to a jury who cannot understand what each other say or think, in order to allow him a chance to escape in the fog through which the twelve good men and true are floundering.

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